

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JOHN DUDENHOEFFER, ALIREZA  
PARTOVIPANAH, *et al.*,

Plaintiffs,

vs.

FIFTH THIRD BANCORP, *et al.*,

Defendants.

Civil Action No.: 08-cv-538

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS FOR  
FINAL APPROVAL OF SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS,  
AND APPROVAL OF PLAN OF ALLOCATION, AND FOR AWARD OF ATTORNEYS'  
FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS  
TO THE NAMED PLAINTIFFS**

## **I. INTRODUCTION**

Plaintiffs John Dudenhoefer and Alireza Partovipannah (“Plaintiffs”), participants in the Fifth Third Bancorp Master Profit Sharing Plan (the “Plan”), respectfully submit this Supplemental Memorandum of Law in further support of their unopposed motions (1) for an order granting final approval of the proposed Settlement,<sup>1</sup> certification of Settlement Class, and approval of Plan of Allocation (“Motion for Final Approval”) (Dkt. No 133) and (2) for an award of attorneys’ fees, reimbursement of expenses, and Case Contribution Awards for the Named Plaintiffs (“Motion for Fees and Expenses”) (Dkt. No. 134). Plaintiffs submit this Supplemental Memorandum to (a) update the Court with regard to the dissemination of the Class Notice, (b) inform the Court that there were no objections to the Settlement, (c) provide the report of Professor Krishna Ramaswamy, who was retained by Class Counsel to evaluate the structural relief negotiated by Class Counsel as part of the Settlement, and (d) provide the report of Daniel Janich, an independent fiduciary retained by Defendants to review the terms of and provide an opinion about the Settlement.

## **II. ARGUMENT**

### **A. Class Notice was Extremely Effective**

As explained in the Memorandum in Support of the Motion for Final Approval, RG/2 Claims Administration LLC (“RG/2 Claims”), an experienced class action claims administrator, mailed individual Class Notices to 32,205 Settlement Class Members on May 11, 2016. RG/2 Claims has provided a supplemental declaration describing its efforts to disseminate the Class

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<sup>1</sup> All capitalized terms not defined herein are defined in the Stipulation of Settlement previously filed with the Court as Exhibit 1 to the Joint Declaration of Mark K. Gyandoh and Thomas J. McKenna in support of Plaintiffs’ unopposed motion for final approval of class action settlement, certification of settlement class, and approval of plan of allocation and motion for an award of attorneys’ fees, reimbursement of litigation expenses, and Case Contribution Awards for the named Plaintiffs (the “Joint Declaration”) (Dkt. No. 135-1).

Notice since the filing of the Motion for Final Approval. *See* Supplemental Declaration of RG/2 Claims, executed June 29, 2016 (“RG/2 Claims Supplemental Decl.”), attached as Exhibit A. As explained in the RG/2 Claims Supplemental Decl., to date, after initially mailing the 32,205 Class Notices, 283 Class Notices remain undeliverable. Ex. 1, at ¶ 3. Thus, the individual Class Notice mailing program had over a 99.12% success rate.

In addition to the individual mailings, the Class Notice was also posted on a dedicated Settlement website – [www.FifthThirdERISASettlement.com](http://www.FifthThirdERISASettlement.com). To date, the website has recorded 737 “hits”. Ex. 1, at ¶ 4. Further, RG/2 Claims established a dedicated toll-free Settlement telephone number with an interactive voice response (“IVR”) system which presented callers with a series of information responses to basic questions. If callers needed further help, or wished to request a Class Notice, they had the option to leave a message for Class Counsel. To date, a total of thirty-one (31) calls were received, and a total of eighteen (18) voice messages were received and forwarded to Class Counsel to return. *Id.* at ¶ 5.

The Class Notice also included an email address to help facilitate communications between Settlement Class Members and Class Counsel. To date, Class Counsel has responded to twenty-four (24) emails from Settlement Class Members relating to general questions and changes of address and fielded telephone calls seeking general information about the settlement.

Due to the over 99% success rate of the individual Class Notice mailing program, coupled with the dedicated website and telephone number, Class Counsel believes the effectuation of Class Notice has, without doubt, satisfied the requirements of due process and FED. R. CIV. P. 23(e).

**B. The Complete Absence of Objections Further Supports the Settlement**

As noted above, on May 11, 2016, the Class Notice was disseminated to 32,205 Settlement Class Members, and over 99% of the Class Notices were delivered. By virtue of the schedule endorsed by the Court, in the Preliminary Approval Order (*see* Dkt. No. 132), the deadline by which any objection to the proposed Settlement was to be filed expired on June 20, 2016. Given that the Class Notice was mailed to Settlement Class Members and posted on the dedicated Settlement website on May 11<sup>th</sup>, Settlement Class Members had forty (40) days to digest the pertinent Settlement-related information before the objection deadline. Moreover, Class Counsel filed the Motion for Final Approval and Motion for Fees and Expenses eleven (11) days before the objection deadline. Class Counsel is very pleased to report that not a single objection to the Settlement has been filed or received to date.

The complete lack of any opposition demonstrates the Settlement Class supports the proposed Settlement. As courts within this Circuit recognize, a small number of objections favor approval of settlements. *See, e.g., In re Se. Milk Antitrust Litig.*, No. 07-cv-208, 2013 WL 2155387, at \*3 (E.D. Tenn. May 17, 2013) (“The lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports approval of the settlements.”); *In re Se. Milk Antitrust Litig.*, No. 07-cv-208, 2012 WL 2236692, at \*4 (E.D. Tenn. June 15, 2012) (reasoning “[t]he small number of objections received can be viewed as indicative of the adequacy of the settlement,” and noting that “[o]nce preliminary approval has been granted, a class action settlement is presumptively reasonable, and an objecting class member must overcome a heavy burden to prove that the settlement is unreasonable.”) (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)); *In re CMS Energy ERISA Litig.*, No. 02-cv-72834, 2006 WL 2109499, at \*2 (E.D. Mich. June 27, 2006)

(finding “[t]he Settlement Agreement in this action warrants final approval pursuant to Federal Rule of Civil Procedure 23(e)(1)(A) and (C) because it is fair, adequate, and reasonable,” recognizing “the lack of objections raised by class members” as support for the conclusion).

The same reasoning applies with equal force to the Motion for Fees and Expenses. *See, e.g., Lowther v. AK Steel Corp.*, No. 1:11-CV-877, 2012 WL 6676131, at \*4 (S.D. Ohio Dec. 21, 2012) (“The Court notes the lack of any objectors to the settlement. The submissions herein reflect that the class notice was sent by mail to class members and that the notice advised the class members that Plaintiffs’ counsel intended to apply for an award of attorneys’ fees of \$1,275,000.00 or 12% of the cash portion of the settlement. Members of the Class were informed that they could object to the amount of attorneys’ fees or expenses requested. The deadline for objecting passed with no objection. The lack of objections is strong evidence of the acceptability of a fee request.”); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at \*3 (“The overall value of the settlement to the class is further illustrated by the relative lack of objections from class members to the requested fees.”).

Class Counsel respectfully submit the fact that zero objections have been received in connection with this Settlement strongly supports the fairness, reasonableness, and adequacy of all aspects of the Settlement discussed in the Motion for Final Approval and the Motion for Fees and Expenses.

**C. The Independent Fiduciary Approves of the Settlement Terms and Class Counsel’s Application for Fees and Expenses**

Additional support for the adequacy and reasonableness of the Settlement as well as Class Counsel’s request for fees and expenses comes from the Independent Fiduciary, Daniel Janich of Holifield Janich & Associates, PLLC, who was retained by Defendants to review the Settlement. Mr. Janich has prepared a report, attached hereto as Exhibit B, approving both the

terms of the Settlement and Class Counsel's application for fees and expenses. As outlined in his report, "after a review of key pleadings, decisions and orders, and interviews with the relevant parties, Holifield Janich & Associates, PLLC has determined" *inter alia*:

- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, the plan of allocation and the amount of any attorney's fee award or any other sums to be paid from the recover, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone;
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances;
- The transaction is not part of any agreement, arrangement or understanding designed to benefit a party in interest; and
- The transaction is not described in Prohibited Transaction Exemption 76-1

See Janich Report at 1. Ultimately, Mr. Janich notes, "we conclude that the Settlement satisfies the requirements of PTE 2003-39, and we would not opt out of the Settlement or object to the Settlement." *Id.* at 2.

While not binding upon this Court, the Independent Fiduciary's report should be viewed as evidence further supporting approval of all aspects of the Settlement as fair, reasonable, and adequate, including the settlement amount of \$6,000,000, the structural reforms to the Plan and the requested attorneys' fees and expenses outlined in the Motion for Fees and Expenses. See, e.g., *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2013 WL 6511860, at \*3 (E.D. Mich. Dec. 12, 2013) (in discussing the settlement of analogous ERISA breach of fiduciary duty class action, the court noted the "independent fiduciary's opinion" was "strong evidence that the negotiations were vigorous, were conducted at arm's length and were without any fraud or collusion"); *Cavalieri v. General Elec. Co.*, No. 06-cv-315, 2009 WL 2426001, \*2-3 (N.D.N.Y. Aug. 6, 2009) (citing the favorable report of an independent fiduciary in support of its finding

that proposed settlement was procedurally fair and its determination to approve the requested attorneys' fees); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1268 (D. Kan. 2006) ("The court fully credits the parties' judgment, as well as the independent fiduciary's opinion, that the settlement is fair and reasonable").

With respect to Co-Lead Class Counsel's Motion for Fees and Expenses, in his Report, Mr. Janich notes "[t]he 33% percentage requested is significantly less than Plaintiffs' Counsels' lodestar and is therefore quite reasonable under the circumstances of this particular case." Janich Report at 11. Ultimately, Mr. Janich concludes:

This case presented a variety of complex issues, the case was hard-fought and skillfully litigated (including an appeal to the Sixth Circuit Court of Appeals and the U.S. Supreme Court), and counsel obtained a valuable settlement in light of the risks involved. Because of the work performed, the result achieved for the Settlement Class, the complexity of the litigation, the litigation risk assumed by Plaintiffs' counsel, and the combination of the percentage and the lodestar multiplier, and the additional Non-Monetary Relief agreed upon by the Parties, Holifield Janich & Associates, PLLC finds the requested attorneys' fees to be reasonable.

*Id.* Mr. Janich also noted that the request for reimbursement of litigation expenses was reasonable. *Id.* at 12. Lastly, with respect to the requested Case Contribution Awards for the Plaintiffs, Mr. Janich noted that, "[t]his award is within range of similar awards in ERISA cases," and referenced the Plaintiffs' declarations attesting that they "both devoted substantial effort and time to the litigation" to reach the conclusion that he finds "the request for the case contribution awards to be reasonable." *Id.* The Independent Fiduciary's approval therefore further supports the fairness and reasonableness of Class Counsel's Motion for Fees and Expenses. *See, e.g., Will v. General Dynamics Corp.*, No. 06-cv-698, 2010 WL 4818174, at \*3

(S.D. Ill. Nov. 22, 2010) (“This Court notes that Class Counsel’s fee has also been found, after review, to be reasonable by an independent fiduciary”).

**D. The Report from Professor Krishna Ramaswamy Confirms the Substantial Benefit the Non-Monetary Relief Provides to the Settlement Class**

In addition to the monetary payment of \$6,000,000, the Parties agreed to the Non-Monetary Relief, which are a series of structural reforms to the Plan which will provide significant benefits to the Plan participants. Specifically, the Non-Monetary Relief includes:

- The freezing of the Fifth Third Stock Fund, including prohibiting new Plan Participants from investing in the Fifth Third Stock Fund;
- Continuing the current practice of matching contributions in cash, rather than in Fifth Third Stock, for a period of at least eight (8) years;
- The dissemination of an annual notice to Plan Participants who currently have more than 20% of their account(s) invested in Fifth Third regarding the benefits of asset allocation and diversification; and
- Improved fiduciary training.

*See* Settlement Agreement, Exhibit A, at § 7.4. As noted in the Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, Approval of Class Notice, Approval of Plan of Allocation, and Scheduling of a Final Approval Hearing (Dkt. No. 131-2), Plaintiffs retained Professor Krishna Ramaswamy, the Edward Hopkinson Jr. Professor of Finance at the Wharton School at the University of Pennsylvania, to provide a valuation of the Non-Monetary Relief part of the Settlement. Attached hereto as Exhibit C is Professor Ramaswamy’s report. As described therein, Professor Ramaswamy values the proposed changes in the Settlement Agreement related to the improved education of Plan participants to be conservatively worth \$1.6 to \$3.2 million. He also opines

that the other forms of non-monetary relief contained in the Settlement Agreement are positive measures which will benefit Plan participants.

### III. CONCLUSION

For the reasons set forth herein and in Plaintiffs' prior submissions in connection with the Settlement, Plaintiffs respectfully request the Court grant the unopposed Motions for Final Approval and for Fees and Expenses.

Dated: July 1, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Mark K. Gyandoh  
Mark K. Gyandoh